



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

September 28, 2022

Re: FOIA Request NLRB-2022-001418

Dear Ms. Mary Audiffred (Wallace Meyaski):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on June 23, 2022, in which you seek all documents in *International Brotherhood of Teamsters Local 270 (Rebel Ridge Less Lethal, Inc.)*, Case No. 15-CB-286429. You originally agreed to assume financial responsibility for the processing of your request in the amount of \$37.00.

We acknowledged your request on June 23, 2022. Subsequently on June 28, 2022, you increased the amount of fees you agreed to assume to \$148.00. On September 26, 2022, via email, you affirmed that your firm is Counsel for the Charging Party in the requested case. Given this certification, references to your client's name and information about them are being released to you.

Your request is granted in part and denied in part, as explained below.

A search of the Agency's electronic casehandling system, NxGen, has been conducted. This search has yielded 107 pages of responsive, releasable records from the requested case file, which are attached.

After a review, I have determined that portions of the records are exempt from disclosure under Exemptions 5, 6, 7(C), and 7(E) of the FOIA (5 U.S.C. § 552(b)(5), (b)(6), (b)(7)(C), and (b)(7)(E)). The records are being provided to you either in their entirety or partially redacted to the extent they were found to be reasonably segregable from the exempt portions of the records.

Specifically, the redactions are made pursuant to Exemption 5, which protects certain inter- and intra-agency communications protected by the deliberative process and/or attorney work product privileges; FOIA Exemption 6, which protects personally identifiable information, the release of which would constitute a clearly unwarranted invasion of personal privacy; FOIA Exemption 7(C), which protects records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy; and FOIA Exemption 7(E), which permits an agency

to withhold records or information compiled for law enforcement purposes that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). With respect to the Exemption 7(E) claim in particular, redactions were made to protect a non-public Agency intranet web addresses. *See, e.g., Poitras v. DHS*, 303 F.Supp.3d 136, 159 (D.D.C. 2018) (withholding “protected internal e-mail addresses, non-public intranet web addresses, and a secure internal e-mail tool” because disclosure would increase risk of unauthorized access to agency's IT system).

Please be advised that references to your client's name and information are being released to you here because you affirmed that you are counsel of record in this matter through your September 26th certification email. You will note, however, that certain redactions were applied to the records, even those submitted by your client. As discussed above, these redactions are necessary and appropriate because of the significant personal privacy interests held by other individuals mentioned or referenced in the records. The fact that your client may be aware of individuals' names, titles, and dates of certain events, or was personally involved in the events arising out of this case, does not negate *others'* privacy interests protected by FOIA Exemptions 6 and 7(C). *See, People for the Ethical Treatment of Animals (PETA) v. Nat'l Insts. of Health*, 745 F.3d 535, 542 (D.C. Cir. 2014) (stating “the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the [requested] information.”).

Your request is denied to the extent that other responsive records yielded from the search are being withheld in their entirety pursuant to FOIA Exemption 5 (5 U.S.C. § 552(b)(5)).

Regarding the records being withheld, eight pages are withheld pursuant to Exemption 5, 5 U.S.C. § 552(b)(5), including two internal recommendation reports, and an internal checklist.

Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions.

Competitive Enter. Inst. v. OSTP, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep't. of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, "it must form a part of the agency's deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not "identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, *see, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

The attorney work-product privilege protects records and other memoranda that reveal an attorney's mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. *See United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, *see Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; *see also Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). *See Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. *See FTC v. Grolier, Inc.*, 462

U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.*

Here, the responsive records being withheld meet the requirements for Exemption 5 protection under both the deliberative process and attorney work-product privileges. They are internal and predecisional. They reflect the views of the General Counsel and her Regional staff concerning policies and strategies in the processing of this unfair labor practice case. Since they contain proposed legal strategy in the case, these internal casehandling records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the records is also attorney work-product, as it reflects legal analysis and/or opinions of the General Counsel's staff and was created to assist superiors in their decision-making process, in anticipation of possible litigation. Accordingly, the records are being withheld in their entirety.

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests "from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation." NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(v). Consistent with this fee category, you "will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought." 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Four hours of professional time were expended in searching for and reviewing for release the requested material. Accordingly, please remit \$148.00.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency's Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use www.pay.gov. From the www.pay.gov home page, scroll down to the bottom left corner to select "Pay a FOIA Request." Click "See all options" and go to "Filter By Agency" to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Brenna Schertz, the FOIA Attorney-Advisor who processed your request, at (202) 273-0064 or by email at brenna.schertz@nlrb.gov, as well as the Agency's FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA

Attorney, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

Kristine Minami
FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlrb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt
Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlrb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

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Please be advised that contacting any Agency official (including the Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ Synta E. Keeling

Synta E. Keeling
FOIA Officer

Attachment: (107 pages)